But either this inference would be rebutted by any intermediate withdrawals from the deposit, or the estate of the decedent would be held liable to account for money so withdrawn—alternatives equally nullifying the depositor's purpose. Therefore if the court did not wish to overrule the decisions giving the beneficiary a right upon the death of the depositor, it was forced either to abandon its insistence on due testamentary form, which had been but lately reasserted in a bank deposit case,[13] or to find that a trust was created in conformance with the depositor's assumed intention, that is, with a power to revoke in whole or in part. The latter, it has been said,[14] is the meaning of the following rule laid down: "A deposit by one person * * * as trustee for another, standing alone, * * * is a tentative trust merely, revocable at will, until the depositor dies or completes the gift * * * by some unequivocal act or declaration, such as delivery of the pass-book or notice to the beneficiary."[15] A majority of the court in *Matter of U. S. Trust Co.*,[16] however, interpreted this rule to mean that the deposit, standing alone, is inchoate and gives the beneficiary no present right or title. Yet the same court assumed that a right might be enforced after the depositor's death upon the ground that the *trust* had not been *revoked*.[17] The theory of a revocable trust is imperative unless lack of testamentary form is to be waived. But on any theory, the New York law is anomalous from the standpoint of the orthodox trust.

In a recent case it appeared that the depositor did not intend possession of the funds to be given until his death, and, though he had notified the beneficiary of the deposit, the property was subjected to a transfer tax. *In re Pierce's Estate* (1908) 112 N. Y. Supp. 594. This decision is correct in holding that the intention of the depositor determines the nature of the beneficiary's interest. Notice does not conclusively give a present right to the possession of the funds, or make the trust irrevocable.[18] The rule laid down by *Matter of Totten*,[19] in providing for the disposition of the bank balances of a depositor, whose intention has not been made clear by the form of the deposit, requires *unequivocal* evidence that he intended to invest another with a present right in his property. It is probable that the courts in seeking to ascertain and enforce this intention will feel themselves bound by no particular theory of a "tentative trust."

NATURE OF THE LIABILITY AT LAW FOR NECESSARIES.—The liability for necessaries supplied to married women, infants, and insane persons, is well settled, but its basis is by no means clearly or uniformly established. An infant was early held liable in an action of debt for necessaries.[1] The requisite *quid pro quo* was present and the courts considered good the replication, "necessaries," to a plea of infancy, for the obvious reason that only if compelled to pay, could the infant supply his wants. The same replication seems, for like considerations, later to have been held sufficient

[13]Sullivan *v.* Sullivan, *supra.*

[14]Matter of U. S. Trust Co. (1907) 117 App. Div. 178, *per* Ingraham, J., dissenting.

[15]Cuff *v.* Cuff (1907) 120 App. Div. 225.

[16]Tierney *v.* FitzPatrick (1907) 122 App. Div. 623; O'Brien *v.* Bank (1905) 101 App. Div. 108.

[1]Y. B. 18 Edw. IV, 2; 10 Henry VI, 14.

in an action on the case on the promise without reference to contractual capacity. Doubtless the continued liability in *assumpsit* led to the idea, in the development of the theory of contracts, that the infant retained to this extent capacity to contract.[2] This view is maintained by Buckley, L. J., in a recent English case. *Nash* v. *Inman* (1908) 68 L. T. 658. Logically on this theory, however, the infant should be held to the contract price; consequently, protection from imposition, ordinarily granted, would be denied when most required. Nor would the obligation, if contractual, cover cases of necessaries supplied an infant too young knowingly to contract, or unconscious from accident. Further, the law in fact limits this liability to the reasonable value of the goods or services furnished,[3] and generally refuses to enforce a contract under seal, or in the form of negotiable paper, unless the consideration may be inquired into and its reasonableness determined.[4] The view of Moulton, L. J., denied by Buckley, L. J., that the liability is quasi-contractual, which may have been the underlying idea in the old action of debt, is more consistent with the present state of the law. The conception of the contractual capacity of a lunatic is undoubtedly due to historical causes. He was not allowed in any action to stultify himself by a plea of insanity.[5] In later cases the old rule has been modified, but the liability upheld on grounds referable rather to quasi-contract[6]—the benefit of the lunatic and the reasonableness of the recovery. Of course, where the action on the contract cannot be maintained, the insane person's liability for necessaries clearly arises *quasi ex contractu*.[7] In imposing a liability upon the husband for necessaries supplied his wife, the early courts, to avoid the difficulty of the wife's utter lack of contractual capacity, resorted to the principles of agency, implying the wife's agency in fact for necessaries furnished during cohabitation, and in law when the husband had defaulted in his duty of maintenance and support.[8] But this theory has not been followed to its logical conclusion: the husband's infancy or his adjudged lunacy have proved no defense.[9]

The vigorous attempt to place the liability for necessaries upon a quasi-contractual basis,[10] finds support in some jurisdictions.[11] Generally, however, the plaintiff may not recover if, in conferring a benefit upon the defendant, whether by increasing his property or by discharging for him a legal duty, he has at his own will foisted an obligation upon the defendant.[12] Where

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[2]Bacon's Abr., Inf. & Age I, 1; Co. Lit. 172a; Ryder *v.* Wombwell (1868) L. R. 4 Exch. 32.

[3]Bacon, Abr., *supra;* Gregory *v.* Lee (1894) 64 Conn. 407.

[4]Earle *v.* Reed (Mass. 1845) 10 Metc. 387; Fenton *v.* White (1818) 4 N. J. L. 100; Stone *v.* Dennison (Mass. 1832) 13 Pick. 1.

[5]Stroud *v.* Marshall (1596) Cro. Eliz. 398.

[6]Anson's Law of Contracts (11th Ed. Huffcut) p. 154.

[7]Baxter *v.* Portsmouth (1826) 7 D. & R. 614; *In re* Rhodes (1890) 62 L. T. R. (n. s.) 342; Sceva *v.* True (1873) 53 N. H. 627.

[8]Manby *v.* Scott (1661) 1 Lev. 4; Johnson *v.* Sumner (1858) 3 H. & N. 261; Debenham *v.* Mellon (1880) L. R. 6 App. Cas. 24; Etherington *v.* Parrot (1703) 1 Salk. 118.

[9]Read *v.* Legard (1851) 6 Exch. 636; Wood *v.* Wood (1863) 1 DeG. J. & S. 465; Turner *v.* Trisby (1720) 1 Str. 168; Cantine *v.* Phillips Admr. (Del. 1854) 5 Hare 428.

[10]Keener, Quasi Contracts, p. 19 *et seq.*

[11]Cunningham *v.* Reardon, *supra* (husband's liability for wife's necessaries); Van Valkinburgh *v.* Watson (N. Y. 1816) 13 Johns. 480; Pretzinger *v.* Pretzinger (1887) 45 Oh. St. 452 (parent's liability for child's necessaries).

[12]8 Columbia Law Review 654.

the benefit has been conferred pursuant to a contract which has been avoided or which has failed because of one party's incapacity, the objection of intermeddling cannot be raised, since the benefit is requested. However, in such cases, strict principle would not limit the liability of the infant, for example, to necessaries, but would require reasonable compensation for all goods requested and beneficially disposed of by him,[13] and this result has been reached in one state,[14] where the law's protection is conserved to the infant by a strict interpretation of the word benefit. This explanation is inapplicable, however, when the donee is a very young child, an adjudged lunatic, or the wife of a delinquent husband. Obviously in these instances the plaintiff comes within the definition of a volunteer, for the "necessity" of the person aided is not of itself sufficient compulsion to warrant the plaintiff's interference. It may be argued that the law has sustained the interference in cases of this kind because of its very high regard for human life and health, illustrated in the field of tort,[15] where contributory negligence is not imputed to one who has been injured while attempting to save an imperilled human being; but, logically, interference would then be limited to instances in which the party aided was actually *in extremis*, whereas "necessaries" has always been a relative term based, in each case, upon the station and circumstances of the parties concerned.[16] It is submitted, however, that though loosely applied this is the real ground for the court's action. The reasoning in some of the early cases lends color to this view,[17] which is further supported by the exemption of a child from liability for necessaries if he is already supplied,[18] and, in England, of a husband who has refused to support his wife if she has adequate means of her own.[19] Moreover the law has, in certain instances, upon considerations of policy, deviated from strict principle, allowing recovery upon a promise implied against the husband for the burial expenses of his wife,[20] and against the executors of the decedent for the expenses of his interment.[21] Clearly both consistency and simplicity would be conserved by the adoption of the quasi-contractual theory.

RIGHTS AND OBLIGATIONS OF PARTY WALL OWNERS.—Though the term party wall is loosely used,[1] there is little warrant for confining its meaning to a wall built upon the boundary line of adjoining lands.[2] The essential consideration seems rather the right of the adjoining owner to anchor his beams in the wall;[3] and one built near the boundary though not upon it,

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[13]Reeve, Dom. Rel. (4th Ed.) p. 307 *et seq.*
[14]Hall *v.* Butterfield (1879) 59 N. H. 354.
[15]8 COLUMBIA LAW REVIEW 667.
[16]Peters *v.* Fleming (1840) 6 M. & W. 42.
[17]Manby *v.* Scott, *supra.*
[18]Barnes *v.* Toye (1884) L. R. 13 Q. B. Div. 410.
[19]Johnson *v.* Sumner, *supra.*
[20]Jenkins *v.* Tucker (1788) 1 H. Bl. 90.
[21]Patterson *v.* Patterson (1875) 59 N. Y. 574.

[1]Watson *v.* Gray (1880) L. R. 14 Ch. Div. 192.
[2]See *contra* Reeves, Real Prop. § 215.
[3]Griffiths *v.* Morrison (1887) 106 N. Y. 165.